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## Note

Attached is the outcome of an inter-sessional meeting held in The Hague from 11 to 15 March 2002, circulated at the request of the Netherlands.

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# Provisional internal rules and regulations of the International Criminal Court

## Inter-sessional meeting of experts held at The Hague from 11 to 15 March 2002

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# I. Introduction

1. At the invitation of the Government of the Netherlands, an inter-sessional experts meeting on the provisional internal rules and regulations of the International Criminal Court was held at The Hague from 11 to 15 March 2002. The session was opened by Edmond Wellenstein, Director-General, ICC Task Force, Ministry of Foreign Affairs of the Government of the Netherlands. Silvia Fernandez de Gurmendi of Argentina served as chairperson of the meeting. Participants at the meeting included governmental and non-governmental experts, coordinators and focal points on various issues before the Preparatory Commission for the International Criminal Court, experts from the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Tribunal for the Law of the Sea, and representatives of the Codification Division of the United Nations Office of Legal Affairs (see list of participants in the annex).

2. The purpose of the meeting was to review rules and regulations in use within the United Nations system, especially as they are used in relation to and by the ad hoc Tribunals for the Former Yugoslavia and for Rwanda, which would be relevant for provisional application by the International Criminal Court at the initial stages of its establishment. This is in accordance with the call for the convening of inter-sessional meetings of experts and the need to prepare documents and undertake activities required, inter alia, for the most efficient establishment of the Court, as highlighted in the road map leading to the early establishment of the International Criminal Court (PCNICC/2001/L.2 and Corr.1).

3. The meeting identified four possible stages towards the establishment of a fully fledged International Criminal Court, namely: the period before the entry into force of the Statute; secondly, the period between the entry into force of the Statute and the first meeting of the Assembly of States Parties; thirdly, the period between the first meeting of the Assembly of States Parties and the election of judges and the Prosecutor; and finally, the period immediately subsequent to the election of the judges and the Prosecutor and their assumption of duties at the seat of the Court. The meeting considered that there was a need for a transitional arrangement addressing the Court's situation during these stages.

4. The meeting focused on documents assembled and executive summaries prepared by the focal points appointed at the eighth session of the Preparatory Commission. This material, aiming to comprise the necessary internal rules and regulations, was presented in three clusters: (a) human resources and administration; (b) budgetary and finance; and (c) operational issues.

5. In the executive summaries, the focal points, inter alia, attempted to present in a prioritized manner the essential rules and regulations for use by the International Criminal Court at the initial stages of its establishment. The executive summaries briefly described the functions of the rules and regulations so established and, where appropriate, identified those of their aspects which would require change or adaptation. Accordingly, in reviewing the relevant rules and regulations as well as the executive summaries prepared by the focal points, the meeting sought to:

(a) Establish and prioritize essential rules and regulations necessary at the initial stages of the establishment and operation of the International Criminal Court;

(b) Identify those aspects of the rules and regulations which would require change or adaptation for use by the International Criminal Court, taking into account the Rome Statute, the draft Rules of Procedure and Evidence and other ancillary documents finalized in accordance with resolution F;

(c) Make the appropriate suggestions and annotations concerning the rules and regulations that may be of use to the International Criminal Court and provisionally applied at its initial stages, before permanent rules and regulations are prepared.

6. In that connection, the meeting proceeded in plenary on the basis of presentations by the focal points, comments by the experts and exchanges of views and comments by participants. The plenary discussions were followed by working group sessions for each of the three clusters.

7. Part II of the present report contains the executive summaries and comments made by the experts and participants, reflecting the main issues raised and discussed during the meeting, for onward transmission by the Preparatory Commission and the Assembly of States Parties to the Court for its consideration.

8. The meeting also made comments and suggestions on the draft financial rules prepared by the focal point, with a view to assisting him in revising and finalizing a text for consideration by the Preparatory Commission in accordance with resolution F.

9. The meeting expressed its gratitude to the Government of the Netherlands for organizing and convening the inter-sessional meeting and to the Governments of Canada, Germany and the United Kingdom of Great Britain and Northern Ireland for providing financial contributions towards the organization of the meeting.

## II. Proceedings

### A. Human resources and Administration

#### 1. Executive Summary by Phakiso Mochochoko, Focal Point, Human resources and Administration[1] and discussion by the Meeting

**Introduction**

10. This Executive Summary is intended to facilitate discussions and foster a better understanding of the documents required by the Court and is thus limited to identifying those documents, prioritizing them where possible and offering some comments on adaptations that may be necessary for the use of some of these documents by the Court. Those essential documents which can be used by the Court with some technical adjustments are identified and briefly described. This will be followed by a discussion of documents which though essential, will require more than technical adjustments. The nature and types of adjustments as well as considerations that will need to be taken into account in preparing these documents will be highlighted.

11. Provisional documents identified under the cluster on human resources and administration are staff regulations, including job descriptions, hiring, classification, promotion and dismissal rules as well as rules related to gratis personnel; provisional rules determining remuneration and staff benefits, including social security, pension systems, health and other benefits; provisional codes of conduct for staff and counsel and provisional rules governing the assignment, remuneration and benefits for defence counsel (directive on legal aid).

12. It should be noted that the UN and in particular the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) already have well developed systems and internal rules and regulations covering all these issues.

13. While the ICC must adopt procedures and mechanisms which match the specific functions of an independent court as much as possible, the existing systems, rules and regulations can provide a useful basis upon which to proceed. All of these must be modified, although some will require more technical modifications and others will require substantial modifications.

**Essential documents**

14. The first priority of the Court will be to recruit qualified and competent staff. A system of recruitment that entails amongst others job classifications; job descriptions; systems for placement and promotion of staff; staff entitlements as well as social security and pension benefits will need to be in place from the very beginning. It would thus appear that the following documents will be essential for the Court from its very beginning:

[1] As revised in the light of the discussions at the inter-sessional meeting.

*Staff Regulations: (UN Doc. ST/SGB/2001/8)*

15. In accordance with article 44 of the Statute, the Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include terms and conditions upon which staff of the court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

16. Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the staff and contain broad principles of personnel policy for the staffing and administration of an organization. Generally the UN Regulations are no different from staff regulations of other international organizations [2] and can thus be applied to the ICC. The nature of the Court as an independent judicial body and the provisions of the Statute and the Rules make it imperative to bear certain factors in mind when drafting the regulations. While the regulations are essential for the Court, their preparation may require more than just technical adjustments. These adjustments and considerations are highlighted in the commentaries that follow.

*Staff Rules: (UN Doc ST/SGB/1995/5 as amended and UN Doc.ST/SGB/2001/3)*

17. The Statute does not directly address the development of more detailed staff rules which presumably should be left to the Registrar and the Prosecutor to develop on the basis of much broader Staff Regulations. The purpose of the rules is to give effect to some of the more broad provisions of the Regulations. Amongst others, the Regulations provide for staff to be appointed either on a permanent or temporary basis.[3]

18. Three sets of staff rules have thus been developed: The first set of rules[4] govern the 300 series staff, which are staff appointed for service for a limited duration (i.e. Short term periods not exceeding six consecutive months, and limited duration appointments not expected to exceed three years). The second set of rules govern the 200 series of staff, which are technical assistance project personnel and staff specifically engaged for conferences and other short term services. The third set of rules[5] govern 100 series staff which apply to all other staff. Of particular relevance to the Court will be the 300 and 100 series of staff rules.

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[2] See Staff Regulations for the Organization of American States, of the European Communities and of International Tribunal for the Law of the Sea

[3] See UN Regulation 4.5 (a)

[4] These are contained in Doc.ST/SGB/2001/3

[5] These are contained in Doc ST/SGB/1999/5

19. It can be envisaged that while the Court will seek to attract competent and qualified staff by offering them 100 series appointments, it will also need staff for short periods of time particularly in its early stages of operation. It will therefore be necessary for the Court at the very early stage, to develop rules to govern the different categories of staff.

20. Both the 100 series and 300 series staff rules will only require minor technical adjustments such as replacing Secretary General with Registrar and/or Prosecutor and referring to the Statute instead of the Charter. There is a relationship between the rules and the Regulations in that each rule implements a particular Article of the Regulations. If the structure and major provisions of the Regulations are retained, the rules can be easily adapted to take account of whatever changes may have been introduced in the Regulations.

*Administrative Instructions*

21. In addition to the rules, the UN has developed various Administrative Instructions for implementing various provisions of the rules and regulations. Three broad categories of such instructions can be identified: The first category covers staff allowances, entitlements and grants; the second category covers staff appointments, placement and promotion and the third category deals with job classifications. The instructions under the first category (allowances and entitlements) include official travel[6]; assignment grant;[7] family visit travel[8]; travel and transportation in cases of death or health related emergency[9]; dependency status and dependency benefits[10]; repatriation grant[11]; family leave, sick leave and maternity11[12] as well as education grant and special education grant for disabled children[13].

22. Instructions on appointments, placement and promotion cover appointments for limited duration[14]; consultants and individual contractors[15];

[6] Instruction ST/A1/2000/20 which implements staff rules 107.1; 107.2; 107.3; 107.6; 107.7; 107.8; 107.9; 107.10; 107.13; 107.15; 207.1; 207.2; 207.3; 207.4 207.5; 207.6; 20715; 207.16; 207.17;307.1;307.2;307.3 and 307.4

[7] Instruction ST/A1/2000/17 which implements staff rules 107.20 and 203.10

[8] Instruction ST/A1/2000/15 which implements staff rules 107.1(a) (v) and (b) and 207.12

[9] Instruction ST/A1/2000/14 which implements staff rules 107.1(a) (vii); 107.2(a)(vii); 107.26; 207.1 (vi); 207.2(a) (v); 207.23 and 307.1

[10] Instruction ST/A1/2000/8 which implements staff regulations 3.3(b) (i) and 3.4, staff rules 103.23; 103.24; 203.4 and 203.7

[11] Instruction ST/A1/2000/5 implementing annex IV to the Staff Regulations and staff rules 109.5 and 209.6

[12] Instruction ST/A1/1999/12 which implements staff rules 105.2; 106.2 and 106.3; 206.3 and 206.7 and 306.2

[13] Instruction ST/A1/1999/4 which implements staff rules 103.20 and 203.8

[14] Instruction A1/2001/2 which implements staff rule 301.1 (a) (ii)

[15] Instruction ST/A1/1999/7 which implements General Assembly resolution 53/221 of 7 April 1999

placement and promotion system[16]; gratis personnel[17] and recruitment procedures for professional staff[18].
The instruction on system for classification of posts[19] sets out policies and procedures for the maintenance of the post classification system.

23. If the Court is to be able to hire staff, it will have to put in place a system for classification of posts; have job descriptions and systems for placement and promotion; define staff allowances, entitlements and grants as well as other benefits including pensions and social security. All these will be required from a very early stage of the existence of the court. Except for gratis personnel instructions which may require more than just technical adjustments, all other instructions can be provisionally used with technical adjustments.

*Pension*

24. The UN operates a Joint Staff Pension Fund which is administered by the Joint Staff Pension Board, a staff pension committee for each member organization and a secretariat to the Board and to each such committee. The Fund was established by the General Assembly and provides retirement, death, disability and related benefits for staff of Member Organizations. Membership to the Fund is open to UN specialized agencies or any other international or intergovernmental organization which participates in the common system of salaries, allowances and other conditions of service of the United Nations and its specialized agencies. Current members outside the UN include the World Tourism Organization; World Meteorological Organization; International Tribunal for the Law of the Sea; International Seabed Authority and International Telecommunication Union.

25. Even if the Court intends to establish its own pension system, this may take time to set up and in the meantime, a decision will have to be taken whether to participate in the UN Fund. Acceptance of the Regulations governing the Fund as well as conclusion of an agreement between the Court and the Board Fund on conditions that will govern the court's admission will be necessary for the Board's recommendation for a decision on admission by the General Assembly.

[16] Instruction ST/A1/1999/8 and applies to professional D-1 level staff appointed under staff rules 104.14 or 104.15
[17] Instruction ST/A1/1999/6 which implements General Assembly resolutions 51/243 of 15 September 1997 and 52/243 of 26 June 1998
[18] Instruction ST/A1/1997/7 which implements General Assembly resolution 51/226 of 3 April 1997
[19] Instruction ST/A1/1998/9 which implements regulation 2.1

**Documents that need substantial adjustments**

**(a) Commentary by the Focal Point**

*Staff Regulations and Rules*

26. The Rome Statute addresses the Staff Regulations in article 44 which provides that "the Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices... The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties." Criteria for hiring, a critical aspect of the staff regulations, must reflect, mutatis mutandis, the criteria set forth for election of judges in article 36(8) of the Statute.

27. The Statute also addresses staffing of the Court more generally in article 42 on the Office of the Prosecutor and article 43 on the Registry. In both cases, the Statute requires the Prosecutor and the Registrar to include staff with expertise specifically relevant to the crimes they will likely address.[20] In a similar vein, the Rules of Procedure and Evidence address the need for the Registrar after having consulted the Prosecutor, to devise a code of professional conduct for counsel and to develop regulations governing the operation of the Registry.

28. In drafting the Staff Regulations and rules, the following considerations will have to be taken into account:

*Independence of the Prosecutor*

29. The Statute provides the Prosecutor with full authority over the management and administration of his Office including the staff, facilities and other resources thereof.[21]
While the Registrar remains the chief administrative officer of the Court, the role of the Prosecutor in staffing and supervising his own office must be recognized. The individual provisions of the regulations will thus have to ensure that the independence of the Prosecutor is fully protected through the division of responsibilities for maintenance of staff related obligations. Even though the Registrar, the Prosecutor and the President will share responsibility for oversight of staff, it may be preferable to centralize some administrative aspects within the Registry.

[20] Article 42(9) calls upon the Prosecutor to "appoint advisers with legal experience on specific issues, including, but not limited to sexual and gender violence and violence against children" Article 43(6) refers to the establishment of the Victims and Witnesses Unit and calls upon the Registrar to ensure that the Unit includes " staff with expertise in trauma, including trauma related to crimes of sexual violence."

[21] Article 42 (2) Rome Statute. See also Rule 9 in terms of which the Prosecutor has to put in place regulations for managing and administering the Office of the Prosecutor.

30. Where some staff related obligations are centralized under the Registrar, the regulations should ensure that this is without prejudice to the independence of the Prosecutor.

*Relationship between the Court and the Assembly*

31. The relationship between the Court and the Assembly of States Parties is not the same as the relationship between the ICTY/R and the UN General Assembly, hence references to the Assembly of States Parties in place of the General Assembly will have to be made with care, keeping in mind the fundamental independence of the court from the Assembly while retaining the Assembly's essential consultative and legislative roles.

*Relationship to other legal instruments*

32. The relationship between the Staff Regulations and other legal instruments, in particular the Statute, the Rules of Procedure and Evidence and the Agreement on Privileges and Immunities should be made clear in the context of the Staff Regulations.

*Fairness and clarity of hiring process*

33. Article 44 of the Statute requires the Registrar and the Prosecutor to appoint qualified staff. The regulations should enable the Court to recruit staff that meet the highest standards of efficiency, competence and integrity, provide opportunities for promotion from within and professional development. They must ensure that the system of recruitment is flexible, efficient, fair and non discriminatory as well as provide efficient and fair resolution of conflicts among staff members or between staff members and the Court.

**(b) Discussion by the Meeting on Staff Regulations, Staff Rules and Pension**

*Staff Regulations*

34. The comment was made that at the outset there needed to be a decision on whether the Court would follow the UN common system. If the UN common system was to apply, the UN Staff Regulations could be used on a provisional basis during the initial period of the Court. It was also noted that thereafter the UN Staff Regulations could serve as a useful model for the Court to promulgate its own regulations. It was noted that if the Court follows the UN common system, consistency on matters such as classification of

posts, the level of renumeration, and social security benefits will need to be ensured. It was considered that there was no reason why the Court should not follow the UN common system.

35. The Meeting noted that the Rome Statute provides for the independence of the Office of the Prosecutor, a matter which would need to be reflected and taken account of in the Staff Regulations. The comment was also made that the Staff Regulations should ensure that there is a fair balance of interest between the staff and the Court. The importance of ensuring representation from the principal legal systems of the world, equitable geographical distribution and gender balance in accordance with article 44 (2) of the Statute was also stressed.

*Staff Rules*

36. The Meeting noted that there were various practical issues that needed to be considered at the initial stage of the establishment of the Court. These included matters related to the recruitment and appointment of staff, including a system for evaluating which staff recruited on a temporary basis should have their contract extended; the job classification system; the salary scale; the benefits and allowances available, including a pension scheme; rules relating to staff assessment; as well as numerous administrative matters. It was noted that for many of these issues the UN Staff Rules could be applied on a provisional basis and could be used as a model by the Court in promulgating its own rules.

37. The comment was also made that while the Rome Statute provides for the independence of the Prosecutor over the management and administration of his/her Office, some of the personnel and administrative aspects of the Prosecutor's Office might be either centralized within the Registry, or through a joint mechanism. In particular, a joint recruitment scheme was suggested, in order to avoid duplication of work as well as improve the efficiency of the recruitment procedure. An appointments and promotions board will need to be established and this could also be a joint body. The suggestion was also made that there should be a joint training procedure for the staff of the Court. The need for close cooperation between the Prosecutor, the Registrar and the Presidency was stressed.

38. As regards the specific matter of the job classification system, the comment was made that the benchmark classification system of the ICSC might be used on a provisional basis during the initial stages of the Court. It was also noted that certain categories, such as investigators, might pose difficulties and the experience of the ad hoc Criminal Tribunals suggests that their classification should not be within the professional category, as this limits the potential candidates with relevant expertise who may not have the requisite academic qualifications to fall within the professional category. It was also suggested that some of the ad hoc Tribunals' job descriptions might be used as a basis to develop job descriptions for the Court.

*Pension*

39. The comment was made that a decision needed to be made on whether or not to apply to the UN Joint Staff Pension Fund. It was noted that there were certain advantages to utilizing the UN pension fund, including that it avoids the time and effort needed to look into other options, as well as providing an incentive to those already within the UN system to apply for employment with the Court. It was also noted that in view of the application procedure for the UN Joint Pension Fund, such a decision should be taken early on in order to ensure that a pension scheme is in place for the commencement of the Court.

**(a) Commentary by the Focal Point**

*Gratis Personnel*

40. In terms of article 44 of the Statute, "the Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by State Parties, intergovernmental organizations or non governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept such offers on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

41. While the Statute indicates that the Assembly of States Parties is to establish the guidelines on the use of gratis personnel, there is no clear indication of who should draft the guidelines. If the Staff Regulations are any indication (given that they are instruments related through their functions), the Registrar may be responsible for drafting the guidelines, in consultation with the Prosecutor and the President.

42. Article 44 makes it clear that the Court may only use gratis personnel in exceptional circumstances, and leaves the responsibility of defining guidelines for those circumstances to the Assembly of States Parties. In formulating such guidelines, the Assembly will be instructed by the principles set out in the Statute such as ensuring the highest standards of efficiency, competency and integrity as well as having due regard *mutatis mutandis* to criteria set out in Article 36 paragraph 8 of the Statute. It should be noted that while governments of non-States Parties may not contribute gratis personnel[22], they may make monetary voluntary contributions to the Court.[23]

[22] Exclusion of a reference to non-States Parties in the list of entities that may contribute gratis personnel indicates the intention to exclude them. This intention is confirmed in the Commentary on the Rome Statute of the International Criminal Court (Otto Triffterer ed. 1999), 647, at 651.

[23] Article 116, Rome Statute of the International Criminal Court.

43. The use of gratis personnel is not subject to the criteria for voluntary contributions, but shall be carried out in accordance with independent criteria. Gratis personnel are not staff members of the Court and therefore are also not subject to the Court's Staff Regulations.[24] As the ICC is a permanent international criminal court and the Court's Statute restricts the use of gratis personnel, it appears that the possibility that the Court may employ gratis personnel each time it is facing a new situation may be unlikely. The Court will have to justify each instance of requirement of gratis personnel as falling under the restrictive language specified by the Statute. Thus, the ICTY emergency rules (allowing gratis personnel for urgent investigations and staffing initially) regarding gratis personnel should most likely become the ICC's permanent rule.[25]

44. Since both the Registrar and the Prosecutor can hire staff for their respective offices, both may accept offers of gratis personnel on behalf of the Court. The guidelines on the use of gratis personnel will have to determine what, if any, limitations on the use of gratis personnel should be applied, once it is determined that the circumstances are exceptional enough to warrant such personnel in the first place. This determination should keep in mind the fundamentally independent nature of the Office of the Prosecutor, to ensure that the guidelines do not unduly limit that independence.

*Scope of application*

45. The requirement in the Statute that gratis personnel may only be employed in exceptional circumstances is indicative of a desire to limit the categories of personnel who the Court can employ gratis. The UN guidelines only apply to Type II gratis personnel.

46. These are personnel whose services are provided outside any other established regime such as interns, associate experts or personnel provided on the basis of non- reimbursable loans. A distinction of a similar nature will have to be made if the Court has arrangements for use of other categories of personnel outside regular staff (i.e. interns and technical cooperation experts, etc.)

*Fairness*

47. The guidelines for gratis personnel should seek to create a system for the efficient and fair use of gratis personnel by the Court. The selection process has

[24] The Assembly establishes the guidelines on gratis personnel. By contrast, the Registrar shall propose staff regulations, which shall then be approved by the Assembly. Commentary on the Rome Statute of the International Criminal Court (Otto Triffterer ed. 1999), 647, at 649.

[25] Thordis Ingadottir, The Financing of the ICC – A Discussion Paper – p.27

to be transparent and non-discriminatory, giving equal opportunity to all eligible nominees.

*Balance of interest*

48. The guidelines should strive to maintain the balance between being a paid servant of their particular governments and their role as a staff member of the International Criminal Court. In order to avoid any doubts and/or confusion about the duties and responsibilities of the Court and the donor, the respective obligations of the Court and the donor must be spelled out in an agreement signed by both parties prior to the engagement of the individual.

*Functions and length of service*

49. The guidelines for gratis personnel should seek to create a limit for the use of gratis personnel. The guidelines should provide for such personnel in special circumstances but also for their removal after these circumstances have passed.

50. Gratis personnel should only perform functions which are strictly in accordance with the conditions of their engagement. Only in exceptional circumstances should they perform supervisory functions. In accordance with Rule 11, gratis personnel may not represent the Prosecutor or Deputy Prosecutor in the discharge of their duties.

*Clarity of circumstances*

51. While care should be taken to ensure that staffing for the Court is always commensurate with its work, there will be urgent, unforeseen and extraordinary circumstances of sudden increases in work pending authorization of extraordinary budgetary requirements for resources. Similarly, there will be times when the Court requires services of specialized expertise not otherwise readily available to it. Recourse to gratis personnel should conceivably be limited to such circumstance. The guidelines should clarify any ambiguity regarding the "exceptional" clause and set forth clearly defined circumstances that will allow the recruitment and use of gratis personnel by the Court. It is doubtful whether the Assembly will want to impose additional conditions and/or restrictions.

*Substitution for permanent personnel*

52. Gratis personnel use should not be the result of poor planning, and should not be a substitute for staff to be recruited against authorized positions for the implementation of mandated programs and activities. Moreover, the gratis personnel should not be sought for positions kept vacant solely for financial reasons and the lack of adequate staff resources should not give rise to the acceptance of gratis personnel.[26]

*Budget concerns*

53. The guidelines should stress that gratis personnel or other voluntary contributions to solve budget and cash flow difficulties should not be construed so as to fall under the narrow circumstances stated in article 44 (4). Acceptance of personnel will no doubt cause financial liability for the ICC, such as support, equipment, and office space. The guidelines should explicitly state the percentage charge, if any, for support services from donors of personnel unless the cost is defrayed upon acceptance by the Assembly of States Parties.

*Equitable geographical representation*

54. The guidelines should ensure that there is no geographical imbalance toward those countries that can afford the personnel and make a sincere effort to solicit personnel from developing countries. Lack of resources is likely to hamper offers of gratis personnel by Least Developed and Developing Countries and this may have an impact on the legal, geographical and gender balance envisaged in Article 36 (8) of the Statute. The ASP may wish to consider creating a trust fund to receive donations from those who wish to sponsor gratis personnel from Least Developed and Developing Countries.

*Continuity and transition*

55. The guidelines should ensure that the eventual departure of gratis personnel does not contribute to the loss of organizational capability and that those positions requiring crucial expertise are filled immediately upon the departure of gratis personnel.

[26] Statement of Group 77 and China before the Fifth Committee at the 53rd General Assembly on the issue of Gratis Personnel, 7 October 1998, New York.

*Relationship with other instruments*

56. The guidelines should be compatible with the Rome Statute and its subsidiary instruments, in particular the Rules of Procedure and Evidence, the Agreement on Privileges and Immunities, and the Staff Regulations and Rules.

*Regular and periodic reporting*

57. Regular periodic reporting to the ASP on the use of gratis personnel will allow the ASP to closely monitor compliance with the guidelines. Such reports should, amongst others, indicate nationalities of the personnel engaged, a summary of their functions and the duration of their service.

*Applicability of guidelines*

58. It should be determined whether the initial and any future transitional phases of the International Criminal Court's development will be considered circumstances that would allow the use of gratis personnel by the court. ICTY and ICTR relied heavily on gratis staff in their early years.[27]

59. A decision will have to be taken whether these guidelines should be amongst the first set of documents to be presented to the ASP either for adoption or for authorization that they be applied provisionally. Experience from the ad hoc Tribunals for Rwanda and Yugoslavia indicates that at their inception and because of the urgent nature of their work, provision of gratis personnel proved to be crucial for facilitating a timely response to begin work prior to recruitment of necessary staff. This need will have to be balanced with the need for continuity and capacity building for the court as early as possible.

**(b) Discussion by the Meeting on gratis personnel**

60. The Meeting noted that, in accordance with the Rome Statute, gratis personnel should only be used in exceptional circumstances. It was suggested that gratis personnel should be used only to fill highly technical posts, such as medical forensics. It was noted that, based on the experience of the ad hoc Criminal Tribunals, gratis personnel might be required during the initial start-up period of the Court and/or in emergency situations. It was also noted however that there was not the same urgency with the Court as there was with the ad hoc Tribunals, and that therefore the emphasis should be on establishing regular staffing posts, such as temporary personnel, rather then relying on gratis personnel, during the initial stages of the Court.

[27] Thordis Ingadottir, The Victims and Witnesses Unit of the ICC - A Discussion Paper, , p.10

61. It was noted that the majority of gratis personnel employed by the ad hoc Criminal Tribunals were from developed countries, although no statistical data to this effect was provided. In this connection, the proposal to establish a trust fund for gratis personnel from developing countries was supported. A comment was made that consideration be given to an automatic contribution to the trust fund by States providing gratis personnel.

62. The Meeting noted that the Assembly of States Parties was required, under the Rome Statute, to develop guidelines on gratis personnel. It was suggested that such guidelines should clarify the duties of such personnel, as well as issues relating to privileges and immunities. The suggestion was also made to adopt a model agreement or template on gratis personnel, which member States would agree to in advance, in order to provide uniformity and avoid delaying the recruitment of such personnel due to the need to negotiate separate individual agreements.

**(a) Commentary by the Focal Point**

*Code of Conduct*

63. The Code of Conduct is only addressed in rule 8 in terms of which the Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft Code of Professional Conduct for Counsel, after having consulted the Prosecutor. In preparing the proposal, the Registrar shall consult with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties. The process for such consultation is set out in rule 20.

64. Both the International Criminal Tribunals for Rwanda and for the former Yugoslavia respectively adopted their codes on June 8 1998 and June 12 1997. Currently, a proposal is under consideration to review the ICTY code and this will have to be taken into account when drafting the code for the Court. Other useful reference sources that can be consulted include the International Bar Association International Code of Ethics as well as the Bars and Law Societies of the European Union Code of Conduct for Lawyers in the European Union.

*Application of the Code*

65. The rules call for the creation of a Code of Professional Conduct without singling out defence counsel for its application. Careful thought will thus have to be given to what standards should apply to prosecution and defence counsel alike and which provisions should be unique to each irrespective of whether a single code or separate codes are developed. In any case, the code should

provide an overarching structure for the protection of due process, balancing the interests of all parties.

66. While the interests of the defendant must be central, the code must also create an environment that allows both prosecution and defence counsel to maintain their professionalism and their independence. Such professionalism is often defined in relation to competence, diligence, maintenance of confidentiality, candor towards the court, fairness and courtesy to opposing counsel and capacity to address conflicts of interest.

*Fairness of process*

67. The Code should set the same standards of professionalism and independence to all counsel before the Court. The system that it creates for monitoring the conduct of counsel must be flexible, efficient and fair especially as it relates to its enforcement and to addressing potential conflicts of interest. The system must be non-discriminatory in its scope and application and should be capable of addressing conflicts between counsel and their clients, between counsel and their national bar associations or jurisdictions as well as between counsel and the Court.

*Contribution to a sui generis criminal justice system*

68. Like the Statute and the Rules, the Code of Conduct must seek to balance between often opposing common and civil law traditions governing the proper practice of criminal law. The Code of Conduct must build on the Statute and the Rules in forging fair innovative compromises between the two systems to suit the unique nature of the Court. In this regard, the relationship between the Code and other instruments and in particular the system of assignment of legal assistance should be made clear in the Code.

*Definitions/ Use of Terms*

69. In defining terms and concepts, care should be taken that such definitions are consistent with the Statute and other instruments. While client and suspect are used both in the ICTY and ICTR Codes, they are not used in the Statute or the Rules. In addition the term "party" is not defined in the Rules. Further thought will have to be given as to whether using these terms could have implications for their compatibility with the Statute and other instruments of the Court. Care should also be taken to ensure that the definition of counsel is consistent with that adopted by the Agreement on Privileges and Immunities, as well as the definition envisaged in the system on assignment of legal assistance.

*Confidentiality*

70. The provision on confidentiality will need to be carefully drafted, taking into account the differences relevant provisions of the draft Rules of Procedure and Evidence.

*Relationship between the Code and the codes of national bars*

71. The relationship between the Code and national codes and in particular conflicts between the two will have to be addressed. Areas in which such conflicts may arise include the extend of professional secrecy; withdrawal of counsel from a case; contingency fees, contacts with judges. As a matter of principle, it must be the case that those who wish to appear before the ICC should first and foremost be bound by its code, otherwise if conflicts do arise, there would be disarray and confusion in the application of various national codes of conduct. However, given that conflict may arise anyway, there has to be some mechanism to assist counsel in addressing these conflicts. It will be important to consult fully on all these issues.

*Reporting misconduct*

72. Reporting of misconduct is another area where there has to be a careful balance between the civil law and common law traditions. Under article 21 of the ICTR Code, counsel may inform the Judge or Chamber before which he is appearing of another counsel's breach or violation of the code. Civil lawyers are only permitted to report professional misconduct of another lawyer to the President of their bar who in turn reports to the bar of the lawyer accused of misconduct. It is not permitted for a lawyer to report misconduct of a colleague to the Court.

**(b) Discussion by the Meeting on the Code of Conduct**

73. It was noted that, based on the experience with the codes of conduct for defence counsel of the ad hoc Criminal Tribunals, lack of effective enforcement by the Registrar damaged the credibility of the Tribunals. It was suggested that the Registrar be given the appropriate tools and resources to ensure effective implementation of the Code of Conduct.

74. It was clarified that, pursuant to rules 8 and 20 (3) of the draft Rules of Procedure and Evidence, the Code of Conduct applied to both defence counsel and legal

representatives of victims. While these rules do not apply to the Office of the Prosecution, this does not however preclude the Prosecution from developing its own code of conduct, which should reflect the same standards, taking into account rules 24 and 25 of the Rules of Evidence and Procedure.

75. As regards the issue of confidentiality, it was noted that the Code of Conduct should reflect the provisions of rule 73 of the Rules of Evidence and Procedure.

76. The suggestion was made to use the codes of conduct for defence counsel of the ad hoc Tribunals on a provisional basis, until such time as the Registrar was in place to promulgate a code for the Court, particularly in view of the fact that the procedures envisaged in rules 8 and 20 (3) of the draft Rules for developing such a code have many stages which could delay its final adoption. In this regard, it was noted that the Registrar "shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties".

77. A comment was made that the ad hoc Tribunal models were not appropriate as they do not cover legal representatives of victims. The suggestion was made that in view of the lack of urgency on this issue, there was no need to apply the codes of conduct of the ad hoc Tribunals on a provisional basis, but rather wait until such time as any entity provided for in rule 20 (3) of the draft Rules is established and available to assist the Registrar with this task. However, it was stressed by others that the Court could apply on provisional basis the standards reflected in the Codes of the ad hoc Tribunals in order to fill the gap until the adoption of a Code of Conduct by the Court, taking into consideration the Statute and the draft Rules.

**(a) Commentary by the Focal Point**

*Assignment of Counsel (Legal Aid)*

78. The Statute does not have detailed provisions on assignment of counsel, but its various Articles dealing with the rights of persons, the accused and victims afford this right. Article 55 (2) of the Statute provides a right to legal assistance to a person being questioned in respect of whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court in all situations where the interests of justice so require. Under article 67(1)(d) an accused has a right inter alia to conduct the defence in person or through legal assistance of the accused's choosing, to be informed of this right and to be assigned legal assistance by the Court in any case where the interests of justice so require.

79. Victims participating in the proceedings may have their views and concerns presented by legal representatives of victims in accordance with the draft Rules of Procedure and Evidence (article 68 of the Statute).

80. It is clear that under rule 90 (5) of the draft Rules victims have access to the Court's legal assistance system in that victims or groups of victims participating in the proceedings who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registrar, including as appropriate, financial assistance.

81. The role of counsel under the Statute and the Rules is thus not limited to the accused, but extends to all persons who are reasonably believed to have committed crimes under the Court's jurisdiction and are subject to questioning as well as victims participating in the proceedings in accordance with the Statute and the draft Rules. The role of counsel in the ICC will thus be different from that of counsel before the Ad Hoc Tribunals. Guidelines on assignment of counsel by the court will thus have to be more comprehensive and should, amongst others, clearly set out criteria that a person must satisfy in order to qualify for legal assistance, the procedures for assignment of such assistance, the calculation and payment of fees and disbursements and the circumstances under which assigned counsel may be withdrawn.

82. It should be noted that rule 21 refers to "criteria and procedures for assignment of legal assistance to be established in the Regulations of the Court" without identifying the form that these criteria should take i.e guidelines, directives, rules etc. A decision will have to be taken on how these criteria best fit into the Regulations of the Court to be adopted by the judges in accordance with article 52 of the Statute.

83. The following considerations have to borne in mind in drafting a document on assignment of counsel:

*ICTY and ICTR models*

84. While the ICTY Directive can be used as a model because it has been amended most recently, certain ICTR provisions which are not found in the ICTY Directive capture the spirit of the Statute and the Rules much better and consideration should be given to incorporating them. Amongst these are the provisions on confidentiality found in article 9 of the ICTR Directive as well as the provision on Applicable law in article 16. The latter provision will however have to be harmonized with rule 22(3)

*Use of terms*

85. If any terms are defined, it must be ensured that such definitions are compatible with the Statute, the Rules and other instruments of the Court. Amongst others, the definition of counsel has to be consistent with the definition adopted in the Agreement on Privileges and Immunities.

86. The Code of Conduct for counsel also purports to define counsel and this raises the question whether all documents should have similar definitions or whether each can define the same concept differently and for its own purposes.

87. "Suspect" is not used anywhere in the Statute or the Rules. While the simple formulation in the ICTY and ICTR Directives is "suspect and accused," the formulation that captures all those intended to be covered by the Statute and the Rules would be a person being questioned under article 55 (2), an accused, a person detained by or on authority of the Court, a group of victims participating in the proceedings in accordance with rule 90 (5) of the Rules. This unwieldy wording would have to replace suspect and accused wherever they appear. Using the word person would seem to be more in line with the Statute and the Rules.

88. Similarly "Legal Aid" is used in both ICTY and ICTR Directives while the Statute and the Rules use assignment of legal assistance or assignment of counsel. There has to be an understanding whether the two can be used interchangeably.

*Eligibility criteria*

89. Traditionally, legal aid is only available to those persons who genuinely need it. However, this need is often difficult to define and often even more difficult to verify. The court's system on assignment of legal assistance must have clear guidelines for determining who is, and who is not eligible for legal assistance. The system should be flexible enough to accommodate those who are completely without financial means and thus in need of full subsidy and those who have some financial means and thus only need partial subsidy. Thorough verification of a person's means will be necessary while at the same time ensuring that a person is not prejudiced by lengthy delays in the investigations.

*Equality of arms between the Prosecutor and the defence*

90. A major issue for all legal aid systems is the question of equality of arms between the prosecution and the defence. This question will be pertinent and particularly problematic for the ICC as a result of the list system of legal assistance provided for in the Statute (as opposed to a system of full time staff lawyers connected to the Court). It is most likely that the Office of the Prosecutor will be more structured, institutionalized and better resourced than the defence. The legal assistance system of the Court must be sufficiently funded to enable it to undertake the same tasks as the prosecution and to ensure the independence of counsel.

91. In accordance with article 43 of the Statute, the responsibility for the non-judicial aspects of the administration and servicing of the Court is with the Registrar. Under rule 20, the Registrar must organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial. To that end, the Registrar is required to assist arrested persons and persons covered by article 55 with obtaining legal advise and the assistance of legal counsel. These functions are to be carried out in such a manner as to ensure the professional independence of defence counsel.

*Free choice of counsel*

92. Rule 21(2) expressly preserves a person's right to freely choose counsel from the list maintained by the Registrar. Free choice has proved problematic in the context of the ICTR and ICTY, where there have been allegations of fee-splitting and gift giving between counsel and client, as well as employment by defence counsel of client's family and friends as defence investigators. All these have allegedly arisen as a result of attempts to encourage the selection of particular defence counsel from the list. The system for assignment of counsel and the Code should complement each other in dealing with these issues. Both documents should clearly state that assigned counsel can not accept compensation for representing a person from any source other than the Court. This will prevent unscrupulous counsel from making it a condition precedent for taking a case from an accused without means that other sources also add to his or her funding.

*Reviews of decisions not to assign counsel*

93. Both Directives establish elaborate procedures for review of the Registrar's decision refusing assignment of counsel (ICTY article 13 and ICTR Article 12). A simplified review procedure is provided by rule 21(3).



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*Appointment and qualifications of counsel*

94. It is necessary to ensure that persons entitled to legal assistance are assigned experienced and qualified counsel. The pre-requisites for assignment of a person as counsel are contained in rule 22.

*Compatibility with the Code and other instruments*

95. In drafting the criteria for legal assistance, due regard must be paid to the Code of Conduct and the Regulations. These documents will provide the overarching governance of the relations between counsel and the court. Proper coordination in the development of all instruments will ensure their compatibility and mutual reinforcement.

**(b) Discussion by the Meeting on legal aid and other human resources and administrative issues**

*Legal aid*

96. It was noted that, on the basis of the experience of the ad hoc Criminal Tribunals, the legal aid system suffered from a lack of effective enforcement. It was suggested that the Registrar be given the appropriate tools and resources to ensure effective implementation of the legal aid system.

97. It was also noted that the matter of legal aid was not urgent as there will not be any lawyers appearing before the Court until after the election of the judges. It was observed that time should be given for the appropriate consultations in accordance with rule 21.

98. With regard to the use of terms, it was noted that the term "party" is also not defined in the Statute and the Rules.

*Training*

99. The comment was made that as highly skilled personnel would be needed for the Court, there should be an emphasis on training right from the beginning. Training programmes should not be limited to the staff of the Court but should also be provided to national courts, in particular to provide local staff with information on the law and practice developed by the Court. It was also noted that there was a need for training of defence counsel.

*Administration of justice*

100. The suggestion was made to establish an administration of justice system to ensure that personnel problems and grievances are addressed. It was noted that there were a number of options, such as using the ILO Administration Tribunal or the UN Administrative Tribunal. A suggestion was made that it could be useful to provide at some point an analysis of the options in order to assist the principal officers of the Court to arrive at an informed decision on this matter.

*Interns and Junior Professional Officers*

101. It was noted that experience of the ad hoc Tribunals show that interns provide a valuable source of assistance, and their participation in the Court should be encouraged. It was noted however that as interns are not renumerated they are usually from developed countries. The suggestion was made to consider establishing a trust fund to encourage interns from developing countries. It was also noted that the ad hoc Criminal Tribunals have benefited from Junior Professional Officers (JPOs) who are paid by their respective countries and spend a longer period with the Court. The suggestion was made to encourage member States to sponsor JPOs from developing countries.

**2. List of documents compiled by the Focal Point**

102. The following documents were compiled by the Focal Point as resource material for the Meeting:

- Staff Regulations (ST/SGB/2001/8)
- Staff Rules – 100 series (all staff members except technical assistance project personnel and staff members specifically engaged for conferences and other short-term services) (ST/SGB/1999/5 as amended by ST/SGB/2001/1 and ST/SGB/2000/1)
- Staff Rules – 300 series (all staff members recruited on short-term or limited duration appointments) (ST/SGB/2001/3)
- Administrative Instructions: Index to Administrative Issuances (ST/IC/2001/1)
- List of posts and examples of job descriptions (ICTY)
- Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (JSPB/G.4/Rev.15)
- Directive on the Assignment of Defence Counsel, 28 July, as subsequently amended, and as last amended on 15 December 2000 (ICTY).

- Directive on the Assignment of Defence Counsel, 9 January 1996, as amended 6 June 1997, 8 June 1998 and 1 July 1999 (ICTR)
- Code of Professional Conduct for Defence Counsel appearing before the International Tribunal, 12 June 1997 (ICTY)
- Code of Professional Conduct for Defence Counsel, 8 June 1998 (ICTR)
- Standards of Professional Conduct for Prosecution Counsel, Prosecutor's regulation no.2, 14 September 1999 (ICTY and ICTR)

### 3. Documents considered essential by the Meeting

103. The Meeting noted that the following documents would be essential for the Court at the initial stage of its establishment:

- UN Staff Regulations;
- UN Staff Rules; and
- Job descriptions from the Ad hoc Criminal Tribunals.

## B. Budgetary and Finance

### 1. Executive Summary by Christian Much, Focal Point on Budgetary and Finance[28] and discussion by the Meeting

#### Introduction

104. Under the cluster of budgetary and financial issues, the Road Map identified a need to provide documents on provisional financial rules, including on procurement. As a matter of methodology, the Focal Point classified the budgetary and finance documents that the Court should have at its disposal, during its first year of operation, into two categories:

(i) Documents that would need the approval of the Assembly of States Parties, which includes the Financial Rules; and

(ii) Documents that did not require adoption of the Assembly of States Parties but would normally be promulgated by the Court official responsible for the financial management of the Court, i.e. the Registrar, acting in cooperation with the Prose-

[28] As revised in the light of the discussions in the inter-sessional meeting.

cutor, in accordance with Regulation 1.4. These included documents in the fields of procurement, cash management, property management and budget and programme planning. The attention of the Court should be drawn to these documents which may serve as use. reference documents for the Court's own norm-setting efforts. As these documents are largely self-explanatory to any experienced administrator, annotations to them are minimal.

105. The distinction made in paragraphs (i) and (ii) above between documents that do, and those that do not need approval by the Assembly of States Parties, was a critical one: Documents requiring approval by the Assembly of States Parties need to be elaborated in muc greater detail than those that would, in the normal course of events, be elaborated and promulgated under the authority of the Court.

106. The day-to-day application of the documents would, as appropriate, greatly benefit from the use of software programmes that have been developed to support the procedures outlined in the documents. In this regard that experiences made at the United Nations Secretariat and at other Courts should be taken into account.

107. The present revised summary focuses on documents relating to (ii). The draft Financial Rules have been dealt with separately and will be a subject of consideration by the Preparatory Commission for the International Criminal Court.

108. Checks and balances are a key element of proper financial management. In this field, the principal authorities are the Assembly of States Parties, its Committee on Budget and Finance, the Presidency, the Registrar, the Prosecutor and the Auditor. Out of these, the latter four are of immediate relevance as of the first day of the Court's operation. However, in the "embryonic" phase of the Court (i.e. between entry into force of the Rome Statute and the election/appointment of judges, of the Prosecutor, of the Registrar and of the Auditor), none of them would be available. Since the Financial Regulations and Rules will have to be applied, at least provisionally, even during the "embryonic" phase, there appears to be a need for some transitional arrangements replicating the said architecture of authorities even within an "embryonic" Court. This is a problem that goes beyond the sphere of financial management. It should be addressed within a general transitional arrangement.

109. The problem highlighted above arises particularly with regard to procurement. This is a function that will certainly be relevant to the Court even in its "embryonic" phase, unless a decision is taken that the Court's procurement authority be outsourced temporarily to another entity or to the host country (cf. draft Financial Rule 110.18). If, however, it is decided that the Court should perform its own procurement functions from the initial stage of its establishment, there would be need to establish, in accordance with certain established conditions elaborated in the Rules, a Provisional Procurement Review Committee, including deciding on its composition and certain monetary thresholds that trigger the involvement of the Committee.

**(a) Commentary by the Focal Point**

*Procurement*

110. The UN Procurement Manual is the basic operational tool of the UN Secretariat in the field of procurement actions. It explains the organisation and functions of the procurement division, specifies authorities for procurement actions and for delegation of authority. It establishes detailed procedures for requisitioning, registering prospective suppliers and contractors, preparing tenders, opening bids and proposals, evaluating proposals and awarding contracts, and it sets parameters for the work of the Procurement Committee. The UN Procurement Manual is, however, more suitable for an organisation with far more extensive procurement action than may be anticipated for the Court. While the Manual may be useful to the Court as an initial reference document, it would benefit from further simplification.

111. As suggested above, there may be a need for some arrangement establishing a Provisional Procurement Review Committee, if it were decided that the Court should perform, at the early stage of its establishment, its own procurement functions.

112. The Court will need the above-mentioned documents on procurement from the early stage of its existence, unless it is decided that the Court's procurement authority be outsourced temporarily to another entity or to the host country (cf. draft Financial Rule 110.18).

**(b) Discussion by the Meeting on procurement**

113. It was noted that there were two options, that of the Court performing its own procurement action from the inital stage of its existence, or that of outsourcing procurement action. It was observed that besides the ICTY and the host country, entities that could be considered to perform procurement on behalf of the Court included UNOPS or specialised private enterprises. It was also observed that, in the event that procurement would be outsourced, the entity to perform procurement on behalf of the Court should have similar experience in dealing with procurement needs as those of the Court. The comment was made that the Court could benefit, in terms of gaining knowledge, training and experience, if a Court official would be placed temporarily within such an entity ("out-house expert"). The Meeting noted, however, that even in the event of outsourcing procurement, the Court would still need experienced in-house staff to specify precisely the requirements of the Court, and to provide oversight. It was also noted that the Court's procurement section should be separate from the general services section and should be appropriately staffed.

**(a) Commentary by the Focal Point**

*Cash management*

114. The UN Finance Manual for Offices away from Headquarters is a particularly useful reference document:

- It contains a wide range of precise financial instructions in a single document;
- Unlike the Finance Manual used at UN Headquarters, it is geared towards the needs of smaller operational units;
- It is also more up-to-date than the Headquarters version.

115. The Court will need this document from its very early stage of existence.

*Property management*

116. The UN Property Management Manual contains a comprehensive set of rules. Its objective is to assign responsibility for custody, proper use, monitoring and control of assets, including by establishing a software-based inventory control system.

117. The Court will need this document from its very early stage of existence.

*Programme and budget planning*

118. The UN Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation (ST/SGB/2000/8) provide useful guidance with regard to the planning, programming, monitoring and evaluation of all Court functions and activities. In adapting these Regulations and Rules to its own needs, the Court will have to take into account the need for cooperation between the Presidency, the Registrar and the Prosecutor, in particular with regard to the independent exercise of the latter's functions under the Statute. Article IV of the above-mentioned UN Regulations and Rules ("Medium-Term Plan") will prove to be a useful reference as soon as the Court decides, or is requested by the Assembly of States Parties, to produce a medium-term plan, as a framework for subsequent programme budgets. However, this is a question that the Assembly of States Parties will not have to consider at its first session.

119. The Court will not need this reference document at the initial stage of its establishment. The document will become relevant as soon as the Court will start preparing the second-year budget, i.e. in mid-2003. However, the Articles on Budget Planning and Programming (III), Monitoring of Programme Implementation (VI) and Evaluation (VII) will be of more imminent benefit to the Court. Accordingly, the Court would benefit from familiarizing itself with this document at an early stage.

**(b) Discussion by the Meeting on other budgetary and finance issues**

*Financing of the Court*

120. The need to ensure that the Court starts off on a secure financial footing was stressed. In particular, it was suggested that mechanisms could be explored to assure that funds are committed upfront and available for use by the Court at its inception. In this connection, the possibility of holding a pledging conference or a similar meeting of pledges was raised. The need to determine as soon as possible the applicable scale of assessment was also highlighted.

*The budgeting cycle*

121. The comment was made that a one-year budgeting cycle would be preferable during the Court's first years of existence, particularly where performance was the established indicator for budget preparation. However, it was suggested that once the situation of the Court was stabilised, it could be desirable to adopt a biennial budgeting cycle.

## 2. List of documents compiled by the Focal Point

122. The following documents were compiled by the Focal Point as resource material for the meeting:

- UN Procurement Manual;
- UN Finance Manual for Offices away from Headquarters;
- UN Property Management Manual;
- UN Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation: articles on Budget Planning and Programming (III), Monitoring of Programme Implementation (VI) and Evaluation (VII);
- Administrative Issuance on a Provisional Procurement Review Committee (if it were decided that the Court should perform, at the early stage of its establishment, it own procurement functions);
- Software programmes for application of the above-mentioned documents, as appropriate.

### 3. Documents considered essential by the Meeting

123. The Meeting noted that the following documents would be essential for the Court at the initial stage of its establishment:

- UN Procurement Manual;
- UN Finance Manual for Offices away from Headquarters;
- UN Property Management Manual; and
- UN Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation: articles on Budget Planning and Programming (III), Monitoring of Programme Implementation (VI) and Evaluation (VII).

## C. Operational issues

### 1. Executive Summary by Sivuyile Maqungo, Focal Point on Operational Issues[29] and discussion in the Meeting

#### Introduction

124. The following issues are contemplated under this cluster, as reflected in the Roadmap:

- Provisional security rules, including: rules for the detention unit; security for investigations; security for VIPs abroad; courtroom, building information and personnel security; field operations and field office security as well as information/communication security including information classification protocols; security liaison functions and training and standards for security officers;
- Provisional rules for investigation protocols and archival systems, including handling of evidence;
- Provisional rules on detention, including rules governing communicating with accused;
- Provisional media and outreach rules and functions;
- Provisional rules on victims and witnesses, including logistics, allowances, information, support services, security arrangements, participation and reparations.

[29] As revised in the light of the discusions in the Intersessionals.

**(a) Commentary by the Focal Point**

**Essential documents**

125. This Executive Summary focuses on two issues, namely documents that are essential during the initial operation of the Court relating to investigation protocols and archival systems, including handling of evidence, and communication and outreach. It is to be anticipated that complaints will commence to be lodged following the deposit of the sixtieth ratification, acceptance, approval or accession. Questions of handling of evidence and the conduct of investigations will therefore become critical at the early stages of the Court's operation. Similarly, it would be necessary to develop a media strategy to address in particular media and outreach aspects which will be important from the outset.

**(b) Discussion by the Meeting**

126. Bearing in mind the possible different stages towards the establishment of the Court identified by the Meeting, it was suggested that it would be desirable to identify the issues and the documents that will be necessary for each stage. It was however noted that although certain documents regarding issues on witnesses and investigations would not be essential at the initial stages it was desirable for the Court to have such documents in order to facilitate preparations for the future operations of the Court. It was emphasised that the documents would have to be modified and adapted as appropriate to ensure conformity with the Rome Statute and the Rules of Procedure and Evidence.

**(a) Commentary by the Focal Point**

*Provisional rules for investigation protocols and archival systems, including handling evidence*

*Handling of evidence*

127. Under the Rome Statute and the draft text of the Rules of Procedure and Evidence, the Prosecutor, the Registrar and the Chambers have important roles to play in the handling of evidence.

128. For example, pursuant to article 54, the Prosecutor may take necessary measures, or request that necessary measures be taken to ensure the preservation of evidence.

129. Under rule 10 of the draft text of the Rules of Procedure and Evidence, the Prosecutor shall be responsible for the retention, storage, and security of information and physical evidence obtained in the course of the investigations by his or her Office.

130. With regard to the Registrar, since the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42, it is to be expected that the Registrar will be responsible for the day-to-day management of the Court, under the supervision of the Presidency. Rule 15 of the draft Rules of Procedure and Evidence provides that the Registrar shall keep a database containing all the particulars of each case brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data. Information on the database shall be available to the public in the working languages of the Court. The Registrar shall also maintain the other records of the Court. Moreover, pursuant to rule 121, the Registrar shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Rule 131 stipulates that the Registrar shall maintain the record of the proceedings transmitted by the Pre-Trial Chamber, pursuant to rule 121. Furthermore, in accordance with rule 137, the Registrar shall take measures to make, and preserve, a full and accurate record of all proceedings, including transcripts, audio-and-video-recordings and other means of capturing sound or image[30] and shall retain and preserve, as necessary, all the evidence and other materials offered during the hearing, subject to any order of the Trial Chamber.[31]

131. Under articles 56 and 57 of the Rome Statute, the Pre-Trial Chamber may in relation to a unique investigative opportunity or where necessary, provide for the protection of witnesses and the preservation of evidence.

*Summary of the provisions of the Directive for the Registry of the International Criminal Tribunal for Rwanda on the Judicial and Legal Services Division*

132. In addressing issues relating to the handling of evidence, the Focal Point relied primarily on the Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and Legal Services Division, Court Management Section, No.2/98, and on general information on the Court Management Section of the International Criminal Tribunal For Rwanda (ICTR) located on the website of the ICTR.

133. The Directive focuses on evidence in the hands of the Registry. It addresses the composition of the Office of the Registry and the duties of the officials in the Office of the Registry and elaborates the functions of the various Divisions and Sections. In particular, the Court Management Section is responsible for maintaining judicial archives; filing, reproduction and distribution of documents; receiving and filing of correspondence and the opening of case files for new cases.

134. The Focal Point suggests in this summary general guidelines that should inform the drafting of the Evidence and Archives Management Rules. Such preparation should

[30] Rule 137(1), Rules of Procedure and Evidence.
[31] Rule 138, Rules of Procedure and Evidence.

be predicated upon the aim of implementing the Rome Statute and the draft text of the Rules of Procedure and Evidence.

*General Guidelines on adjusting the Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and Legal Services Division, Court Management section, No. 2/98*

*Centralized and Synchronized System for records and archives*

135. Consistent with rule 15 of the draft Rules of Procedure and Evidence, the system must contemplate the maintenance and management of records and archives as a coordinated and centralized process. This system should be centralized such that records and archives are managed together, and synchronized so that there is always a consistent record of those materials checked in and checked out of the central system. Although the system will be accessible by various individuals, one individual should be designated as the person who oversees the management of both sets of materials, the records and the archives.

*Maintenance of Integrity and Chain of Custody of Evidence*

136. The Office of the Prosecutor will, in accordance with rule 10 of the Rules of Procedure and Evidence, be responsible for the retention, storage and security of information and physical evidence obtained in the course of investigations until they are transmitted to the Pre-Trial Chamber in accordance with rule 121. At trial the Registrar's office takes responsibility for maintaining the evidence and documentation for both parties in the proceeding. This power of the Office of the Prosecutor is particularly useful in the investigation phase, where the need to protect the integrity of information is essential in the preparation of the prosecution's case. Regardless of who is managing the evidence or exhibits, certain types of evidence will require special storage such as acid-free sleeves for paper, safes to hold guns and ammunition, and secure cabinets for videos and tapes. Evidence will need to be digitized. External arrangements may need to be made with mortuaries and other facilities in the host State to handle such matters as exhumed remains and bio-hazardous materials. Assurances would be required that these external arrangements meet all security concerns. Maps might also be necessary to be used in conjunction with evidence, and the Court's library may need to collect and store these items. The rules should therefore be flexible enough to allow the Prosecutor to subcontract, as and when he or she deems it appropriate, the services necessary for proper preservation of evidence.

*Security of Information and Evidence*

137. A certain level of security must be established such that the chain of custody and the integrity of the evidence is maintained. Access to evidence must be limited to certain

levels of personnel, and all possible mechanisms must be put into place to ensure that no tampering of evidence occurs. It might be useful to place the Office of the Prosecutor on a different computer network from the rest of the Court.

*Technical adaptation of the Directive*

138. The language of the text of Directive 2/98 of the ICTR would have to be adapted to relate to the International Criminal Court. For example, the reference to the "victim and witness support section" in the ICTR draft would have to be changed so that it refers to the Victims and Witness Unit which is supposed to be established within the Registry in accordance with article 43(6) of the Rome Statute. Overall the necessary adaptations would aim to ensure conformity between the document and the Rome Statute and the Rules of Procedure and Evidence.

*Structural adaptation of the Directive*

139. At the early stage of the Court, it may be that the Registrar adapts Directive 2/98 in accordance with his or her office in line with the Rome Statute and the draft Rules of Procedure and Evidence and may later amend it in keeping with developments in his or her office.

*Conduct of investigations*

140. ICTY and ICTR documents pertaining to the conduct of investigations are largely classified and confidential. However, Officials of the ad hoc Criminal Tribunals would be available to brief from the beginning Court officials on all matters relating to the conduct of investigations and archival systems.

**(b) Discussion by the Meeting on evidence and investigations, including the Directive**

141. Handling of evidence was also considered critical for the operations of the Court during its initial stages. It was stressed that a number of issues needed to be addressed from the very beginning in respect of documentation, including the establishment of databases which would incorporate archiving, record keeping, search tools and filing capabilities (including standard-setting), determination of the filing modalities (e.g. whether electronically, by fax, by hand etc) and filing standards (including content and lay out), issues concerned with the establishment of the central registry (for administration and judicial proceedings, with a coherent and logical system for tracking documents, particularly taking into account the likely initial workloads of the Pre-Trial and Appeals Chamber), the procedures for receiving and filing documents (filing, record keeping and archival), internal procedures for distribution and dissemination of judicial

documents, documents relevant to the judicial proceedings and mail and other correspondence, keeping of evidence (including the provision of climate controlled units, formal evidence storage units and secondary storage depot, and the eventual assistance from States and international organizations), language policies and provision of translation and interpretation services, keeping the record of the proceedings (including equipment requirements and training), security and confidentiality of documents as well as issues relating to participation of victims. It was underlined that it would be necessary from day one for the Court to be able to receive documents. In this connection, it was emphasized that arrangements should be put in place to enable the receipt, appropriate handling and custody of communications addressed to the Court upon the entry into force of the Statute until officials of the Court assume responsibility.

142. Specific points were also made on the relevance of the Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and Legal Services Division, Court Management Section, No.2/98 to the Court. It was highlighted that the functions of the Registry under the Rome Statute include dealing with participation of victims and reparation, functions which the above-mentioned directive does not address. Consequently, it was suggested that in adapting the Directive for the Registry of the International Criminal Tribunal for Rwanda for utilisation by the International Criminal Court, consideration be given to the setting up of the necessary structures. For example, a comment was made that there could be established a specific section relating to victims (for participation in the proceedings and reparations) within the Registry. Similarly, it was observed that the rules relating to the use of terms and case files under the above-mentioned directive should take into account the provisions of the Rome Statute and the Rules of Procedure and Evidence, particularly those relating to participation of victims and their access to case files.

143. The need to define the relationships between the sections, particularly between the court management and chamber support services was singled out. In terms of the functional relationship between the Court Management Section and the Chambers Support Section, three options were suggested for consideration: (i) Court Management and Chamber Support under the overall responsibility of the Presidency; (ii) Court Management and Chamber Support under the overall responsibility of the Registrar or (ii) Chamber Support under the overall responsibility of the Presidency and Court Management under the responsibility of the Registrar. It was observed that it was significant for the Chambers and the Registry to collaborate with each other to ensure effective judicial functioning.

144. Considering that quite often it was difficult to change at later stage systems already established, it was noted that it was important to plan earlier on the systems to be applied. Consequently, it was suggested that Chambers should be afforded the opportunity to make an input on the systems to be established. It was noted that it was critical that qualified staff are recruited from the early stages of operation. Taking into account the possibility that the Court may be seized with jurisdictional questions from the beginning, the comment was made that a minimal Chamber support presence be in place for the Pre-Trial and Appeal Chambers. In addition, a functioning court room with

appropriate facilities and systems for establishing electronic database was vital at the initial stages. It was also considered necessary that uniform standards for Court orders and motions are developed by the Court. In view of the administrative functions of the Office of the Presidency under the Rome Statute it was suggested to look into the necessary logistics for the Office.

145. Moreover, the need to establish protocols and standard operating procedures for the conduct of investigations, addressing issues such as gathering evidence, information gathering and sources, identification and management of sensitive information, use of interpreters, taking of witness statements and witness management was highlighted.

**(a) Commentary by the Focal Point**

*Media and Outreach*

146. There are no documents regulating the information and communication strategy in any of the ad hoc Criminal Tribunals and thus no specific document is herein recommended for provisional use. However, from the experience of the ICTY and the ICTR an effective and competent Public Information and Outreach office is absolutely essential for the institutions' overall legitimacy and success. Both the ICTY and ICTR have faced severe criticism due to underdeveloped public information and outreach efforts.[32]

147. The Public Information Office of the ICTY has as its mandate the following functions[33]:

- Press – Responsible for media relations, media logistics and media monitoring. Production of regular press releases, holding of weekly press briefings and the provision of background discussions and interviews with the Spokesman for the Tribunal/Head of Press Unit.

- Legal – Responsible for production of legal information materials such as weekly Status of Cases, information sheets on outstanding indictments and ongoing trials, weekly electronic mailing list and the monthly Judicial Bulletin summarizing the most significant rulings of the Chambers, public information materials on Tribunal procedures, policies on arrests and indictments, rights of accused and victims, press releases and briefings, weekly updates, bulletins, Judicial Supplement, annual report, fact sheets, decisions, status reports of indictees/indictments, "User's Guide to the ICTY."

[32] Research recently conducted by an ICTY team found that it was common perception that, "many feel that the IT is remote and disconnected from the population and that there is little information available about it."

[33] ICTY "Annual Report 2001" (UN Doc A/56/352-S/2001/865) paragraphs 217 – 223.

- Internet – responsible for updating the home page for the Tribunal on an on-going basis, and making it user friendly, including the establishment of local language pages.

- Publications and Documentation – Responsible for responding to requests for information, providing weekly collections of legal documents to international law centers, universities and international organizations, providing background information, editing the Judicial Reports and coordinating official visits to the Tribunal.

148. It is recommended that the ICC consider developing the functions outlined above. It is necessary at the initial stage of the Court that experienced media personnel be appointed as soon as possible so that they may develop a communication strategy.

**(b) Discussion by the Meeting on media and outreach and other operational issues**

*Media and outreach*

149. The necessity for media and outreach programmes in the early stages of the Court's establishment was echoed. It was considered appropriate to draw up a general plan of outreach activities which could be mobilized and deployed at an appropriate time. It was suggested that outreach activities should be sourced from the regular budget. It was observed that during the period before the entry into force of the Statute, awareness campaigns to inform the public of the process to establish the Court could be useful. After the entry into force of the Statute it was suggested that it would be useful to have a media strategy to address the high expectations of the general public. In particular public information should seek not only to inform of the activities and functions of the Court but also to advise on the procedures to be followed for accessing the assistance of the Court. The possibility of appointing a spokesperson for the Assembly of State Parties and establishing regional offices was raised. It was also suggested that guidelines on public information should take into account the audience targeted, such as the press and broadcast media, representatives of Governments (Parties and non-Parties to the Statute), the professions and academia, civil society and the general public.

*Security rules*

150. Security (Court premises, personnel, archives, documents, communications etc) was identified as a priority issue that required consideration quite early on in the establishment of the Court. It was however recognized that issues relating to security were essentially treated as secret and confidential by the ad hoc Criminal Tribunals. Consequently, information on certain aspects could not be divulged. At the same time, it was noted that officials from these institutions expressed their readiness to brief officers

of the Court, during the initial phase of its operation, on the security arrangements that would be required.

*Provisional rules on detention; including rules governing communications with accused*

151. While it was important to have detention rules, it was suggested that such rules were not a priority issue.

*Provisional rules on victims and witnesses, including, logistics, allowances, information, support services, security arrangements, participation and reparations.*

152. It was observed that without a competent Victims and Witnesses Unit, with properly trained personnel, the Court would have difficulties in obtaining the best testimony. It was asserted that questions relating to the management of witnesses and the relationship in that regard between the Registry and the Office of the Prosecutor needed reflection during the initial stages in order to avoid loss of useful testimony, resources and possible conflict of interest between the Registry and the Office of the Prosecutor. Consequently, it was suggested that the VWU should be in place from the inception. It was also claimed that this was necessary in light of the envisaged role of victims in the overall scheme of the Rome Statute. The importance of an early establishment of international contacts by the VWU was also stressed. Furthermore, it was stated that substantial resources would be required to run the operations of the VWU. It was therefore considered appropriate that the VWU should be well funded.

*Training*

153. The importance of appointing suitably qualified persons and exposing them to relevant training in order for them to efficiently carry out their assigned functions was emphasised.

*Languages*

154. It was pointed out that the Court, and any preparatory arrangements, would need to make provision for necessary translation and interpretation serviced from early on.

## 2. List of documents compiled by the Focal Point

155. The following documents were compiled by the Focal Point as resource material:

- Practice Direction on the length of briefs and motions;

- Practice Direction on Procedure for the filing of written submissions in Appeal proceedings before the International Tribunal; and

- Practice Direction on the length of briefs and motions.

- Directive on Allowances for Witnesses and Expert Witnesses (IT/200), adopted on 5 December 2001 (ICTY)

- Code of Ethics for Interpreters and Translators employed by the International Criminal Tribunal for the Former Yugoslavia, 5 March 1999 (ICTY)

- Rules governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or Otherwise detained on the authority of the Tribunal (IT38/Rev.8), adopted on 5 May 1994, as subsequently amended, and as last amended 29 November 1999 (ICTY).

- Rules covering the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise detained on the authority of the Tribunal adopted on 9 January 1996, as subsequently amended, and as last amended 29 November 1999 (ICTR).

- House Rules for Detainees (IT/99) issued in April 1995, amended in June 1995 (ICTY).

- Regulations for the establishment of a disciplinary procedure for detainees (IT/97) issued in April 1995 (ICTY)

- Regulations for the establishment of a disciplinary procedure for detainees (ICTR/3/L.4) issued in June 1996 (ICTR)

- Regulations for the establishment of a complaints procedure for detainees (IT/96) issued in April 1995 (ICTY).

- Regulations to govern the supervision of visits and communications with the detainees (IT/98/REV.3), April 1995, as subsequently amended, and as last amended in July 1999 (ICTY).

- Agreement on Security and Order between the ICTY and Netherlands on Matters relating to security and order of the leased premises within the Penitentiary Complex, signed on 14 July 1994.

## 3. Documents considered essential by the Meeting

156. The Meeting noted that the following document would be essential as precedent for the Court at the initial stage of its establishment:

- Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and Legal Services Division, Court Management Section, No.2/98;

# Annex

## List of participants

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| Bindernagel, Ken | International Tribunal for Rwanda, Arusha |
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| Hebel, Herman von | ICTY/Chambers, The Hague |
| Hocking, John | International Tribunal for the Former Yugoslavia |
| Kennedy, Tom | International Tribunal for Rwanda, Arusha |
| Stuebner, Bill | Institute for International Criminal Investigations |
| Tolbert, David | American Bar Association, Washington D.C. |
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